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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/710,966	11/14/2000	Scott D. Landes	5482	6125

7590 08/24/2005

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EXAMINER

COURSON, TANIA C

ART UNIT	PAPER NUMBER
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2859

DATE MAILED: 08/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

H.A

Office Action Summary	Application No.	Applicant(s)	
	09/710,966	LANDES, SCOTT D.	
	Examiner	Art Unit	
	Tania C. Courson	2859	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 May 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6,8,9,11 and 12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6,8,9,11 and 12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 November 2000 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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1. The non-final rejection for claims 1-12 of the last Office action (mailed on May 5, 2004) is withdrawn based on applicant's persuasive arguments that the Ebinger reference does not teach an elongated member "drivable into a top layer of soil". The non-final rejection is being reissued in this paper.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-6 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,099,203 (Landes) in view of Stuart (US 6,461,084 B1) and further in view of Ebinger (US 3,709,112). The limitations as stated in claims 1-6 of this application are indicated in the combination of claims 1-5 of U.S.

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Patent No. 6,099,203 (Landes) in view of US 6,461,084 B1 (Stuart) and in view of U.S. Patent No. 3,709,112 (Ebinger).

Landes '203 discloses a marker post including the following:

- a) a one-piece hollow elongated member (Fig. 1, post 10), said one-piece hollow elongated member composed of a flexibly resilient polymer plastic (column 4, lines 24-25), said one-piece hollow elongated member having a first end and a second end (Fig. 1), said one-piece hollow elongated member drivable into a top layer of soil (column 4, lines 8-11);
- b) wherein said polymer plastic is polycarbonate or polyethylene (column 4, line 26);
- c) wherein said elongated member is triangular, circular, rectangular or square shaped (Fig. 1) and said elongated member includes a non-tapered exterior surface (Fig. 1);
- d) wherein said elongated member is weather resistant (column 2, lines 49-53).

Landes '203 does not disclose the following:

- a) a first integral anchoring flap and a second integral anchoring flap, each of said anchoring flaps having a first end and a second end, each of said anchoring flaps located proximate a second end of said elongated member, a first hinge and a second hinge, the second end of said first anchoring flap

attached to the said elongated member by said first hinge, the second end of said second anchoring flap attached to said elongated member by said second hinge, the second end of said third anchoring flap attached said elongated member by said third hinge, each of said anchoring flaps moveable from a first closed position to facilitate the handling and transportation of said marker post to a second open position to prevent the withdrawal of said elongated member from an embedded position.

- b) including a weather resistant cap for covering the first end of said elongated member to prevent rain or snow from entering the elongated member.

Stuart teaches a post that consists of a first integral anchoring flap and a second integral anchoring flap (Figs. 1 and 4, deflectable portions 11), each of said anchoring flaps having a first end and a second end (Figs. 1 and 4), each of said anchoring flaps located proximate a second end of said elongated member (Figs. 1 and 4), a first hinge and a second hinge (Figs. 1 and 4, deflectable portions 11), the second end of said first anchoring flap attached to said elongated member by said first hinge (Fig. 1), the second end of said second anchoring flap attached to said elongated member by said second hinge (Fig. 1), each of said anchoring flaps moveable from a first closed position to facilitate the handling and transportation of said marker post (column 3, lines 37-40) to a second open position to prevent the withdrawal of said elongated member from an embedded position (column 3, lines 37-40). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the guide

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post of Landes '203, so as to include integral anchoring flaps with hinges attached to an elongated member, as taught by Stuart, so as to enhance the engagement of the post to the ground (column 3, lines 39-40).

Once modified, since the hinge and flap are integral to a material and perform the same function, therefore the hinge and flap are considered to be a "flexible living hinge", as well as "weather resistant", upon modification of Landes '203 in view of Stuart.

Furthermore, it is noted that Stuart normally has the flaps/deflectable portions in a closed position since there are "a number of deflectable portions, such as 11 which may be pushed from the fin 1a so as to enhance the engagement of the fin with the ground" (column 3, lines 37-40), therefore it is implied that the flaps/deflectable portions remain closed from manufacturing to the seller to the user up to prior to inserting the post into the ground. It is also implied, with respect to Stuart, that the user "pushes" the deflectable portions into an open position, similar to the applicant's specification (page 4, line 27 through page 5, line 1) which states "The hinges are sufficiently flexible so that the user can bend the flaps out".

Ebinger teaches a post that consists including a weather resistant cap (4) for covering the first end of said elongated member to prevent rain or snow from entering the elongated member (column 3, lines 15-16). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the guide post of Landes '203, so as

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to include a weather resistant cap, as taught by Ebinger, so as to cover and provide protection to the hollow member.

4. Claims 8-9 and 11-12 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,099,203 (Landes) in view of Stuart (US 6,461,084 B1) and further in view of Ebinger (US 3,709,112). The limitations as stated in claims 8-9 and 11-12 of this application are indicated in the combination of claims 1-5 of U.S. Patent No. 6,099,203 (Landes) in view of US 6,461,084 B1 (Stuart) and in view of U.S. Patent No. 3,709,112 (Ebinger).

Landes '203 discloses a marker post including the following:

- a) a one-piece triangular shaped elongated member (Fig. 1, post 10) having a first panel (11), a second panel (12) and a third panel (13) forming the one-piece triangular shaped elongated member, said one-piece triangular shaped elongated member composed of a flexibly resilient polymer plastic (column 4, lines 24-25), said one-piece triangular shaped elongated member having a first open end and a second open end (Fig. 1), said one-piece triangular shaped elongated member drivable into a top layer of soil (column 4, lines 8-11);
- b) wherein said polymer plastic is polycarbonate or polyethylene (column 4, line 26);
- c) wherein said elongated member is weather resistant (column 2, lines 49-53).

Landes '203 does not disclose the following:

- a) a first integral anchoring flap, a second integral anchoring flap, and a third integral anchoring flap, each of said anchoring flaps having a first end and a second end, each of said anchoring flaps located proximate a second end of said elongated member, a first hinge, a second hinge, and a third hinge, the second end of said first anchoring flap attached to the said elongated member by said first hinge, the second end of said second anchoring flap attached to said elongated member by said second hinge, the second end of said third anchoring flap attached said elongated member by said third hinge, each of said anchoring flaps moveable from a first closed position to facilitate the handling and transportation of said marker post to a second open position to prevent the withdrawal of said elongated member from an embedded position.
- b) including a weather resistant cap for covering the first end of said elongated member to prevent rain or snow from entering the elongated member.

Stuart teaches a post that consists of a first integral anchoring flap, a second integral anchoring flap, and a third integral anchoring flap (Figs. 1 and 4, deflectable portions 11), each of said anchoring flaps having a first end and a second end (Figs. 1 and 4), each of said anchoring flaps located proximate a second end of said elongated member (Figs. 1 and 4), a first hinge, a second hinge, and a third hinge (Figs. 1 and 4, deflectable portions 11), the second end of said first anchoring flap attached to said elongated member by said first hinge (Fig. 1), the second end of said second anchoring flap attached to said elongated member by said second

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hinge (Fig. 1), the second end of said third anchoring flap attached to said elongated member by said third hinge (Fig. 1), each of said anchoring flaps moveable from a first closed position to facilitate the handling and transportation of said marker post (column 3, lines 37-40) to a second open position to prevent the withdrawal of said elongated member from an embedded position (column 3, lines 37-40). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the guide post of Landes '203, so as to include integral anchoring flaps with hinges attached to an elongated member, as taught by Stuart, so as to enhance the engagement of the post to the ground (column 3, lines 39-40).

Once modified, since the hinge and flap are integral to a material and perform the same function, therefore the hinge and flap are considered to be a "flexible living hinge", as well as "weather resistant", upon modification of Landes '203 in view of Stuart.

Furthermore, it is noted that Stuart normally has the flaps/deflectable portions in a closed position since there are "a number of deflectable portions, such as 11 which may be pushed from the fin 1a so as to enhance the engagement of the fin with the ground" (column 3, lines 37-40), therefore it is implied that the flaps/deflectable portions remain closed from manufacturing to the seller to the user up to prior to inserting the post into the ground. It is also implied, with respect to Stuart, that the user "pushes" the deflectable portions into an open position, similar to the applicant's specification (page 4, line 27 through page 5, line 1) which states "The hinges are sufficiently flexible so that the user can bend the flaps out".

Ebinger teaches a post that consists including a weather resistant cap (4) for covering the first end of said elongated member to prevent rain or snow from entering the elongated member (column 3, lines 15-16). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the guide post of Landes '203, so as to include a weather resistant cap, as taught by Ebinger, so as to cover and provide protection to the hollow member.

Response to Arguments

5. Applicant's arguments filed on May 23, 2005 have been considered but are moot in view of the new ground(s) of rejection.

6. With respect to the arguments made in reference to Double Patenting, the obviousness type Double Patenting rejection remains with a change in the additional secondary reference utilized. The fact that the Landes '203 reference claims more ("integral web", claim 1, line 24) than the applicant's current claims, is irrelevant, the Landes '203 reference may contain additional elements than the broadly specified claims per the applicant.

7. With respect to the arguments made in reference to Stuart, the Stuart reference is only used to teach the hinges, the Ebinger reference, as well as the Landes '203 reference, already teaches the elongated member.

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Conclusion

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tania C. Courson whose telephone number is (571) 272-2239. The examiner can normally be reached on Monday-Friday from 8:00AM to 4:30PM.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Diego Gutierrez, can be reached on (571) 272-2245.

The fax number for this Organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

DIEGO F.F. GUTIERREZ
SUPERVISORY PATENT EXAMINER
GROUP ART UNIT 2859

TCC
August 22, 2005


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